Supreme Court, U.S.
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No. 06- 06-780

IN THE

Supreme Court of the United States

DARRYL G. DAVIS,

Petitioner,

v.

GEORGE MASON UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Darryl G. Davis presents the following questions for review:

1. Whether the court of appeals erred in determining that no contract existed between Darryl Davis and George Mason University.

2. Whether the court of appeals erred in determining that an interest to be protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution did not exist.

3. Whether the court of appeals erred in determining that Darryl Davis failed to plead a violation of his procedural and substantive due process rights.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Darryl G. Davis respectfully petitions for a writ of certiorari to review the judgment of the Untied States Court of Appeals for the Fourth Circuit in this case.

JURISDICTIONAL STATEMENT

The court of appeals judgment was filed on August 3, 2006. A timely petition for rehearing was denied on September 13, 2006. The United States Supreme Court has jurisdiction over this matter pursuant to section 1254(1) of title 28 of the United States Code. The court of first instance, the United States District Court for the Eastern District of Virginia, had original jurisdiction to hear this matter pursuant to section 1331 of title 28 of the United States Code based on federal question jurisdiction and section 1367 of title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV, sec. 1 provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Darryl G. Davis seeks review of the court of appeals decision below that (1) a contract did not exist between Mr. Davis and George Mason University; (2) Mr. Davis did not have an interest to be protected by procedural and substantive due process; and (3) that Mr. Davis failed to plead a procedural and substantive due process violation.

This case arises out of the dismissal of Darryl Davis from the International Commerce and Policy masters program by George Mason University. Mr. Davis filed a Complaint in the United States District Court for the Eastern District of Virginia alleging the following four counts: (1) Declaratory Judgment; (2) Violation of Mr. Davis' Right to Procedural Due Process; (3) Violation of Mr. Davis' Right to Substantive Due Process; (4) Breach of Contract.

George Mason University filed a motion to dismiss for failure to state a claim in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure requesting the dismissal of all counts alleged in the Complaint. An opposition to the motion was filed by Mr. Davis and a hearing occurred before the district court.

On October 3, 2005, the district court entered an Order granting George Mason University's Motion to Dismiss, but stayed the time for filing an appeal until the district court issued a written final judgment. On October 21, 2005, the district court entered a Memorandum Opinion granting judgment in favor of George Mason University and against Darryl G. Davis. On November 21, 2005, Darryl G. Davis filed a Notice of Appeal.

On August 3, 2006, the United States Court of Appeals for the Fourth Circuit entered its judgment and affirmed the district court's ruling. On August 15, 2006, Darryl G. Davis filed a Petition for En Banc Hearing. On September 13, 2006, the Petition for En Banc Hearing was denied.

This petition for a writ of certiorari is based on the facts summarized below. Petitioner Darryl Davis was enrolled in the International Commerce and Policy masters program at George Mason University ("George Mason"). Mr. Davis has fulfilled all of the requirements for his masters degree except for completing a course identified as ITRN 504 Microeconomics and Trade for International Commerce.

In the Fall Semester of 2002, Mr. Davis received a grade of "F" in ITRN 504 Microeconomics and Trade for International Commerce. In the Summer Semester of 2003, Mr. Davis enrolled in the same course at George Washington University ("George Washington"), which is a member of a consortium along with George Mason that allows students at either university to complete course work at the other university.

During the Summer Semester of 2003, Mr. Davis experienced health problems related to his foot and ankle that resulted in extensive surgery to his foot and ankle and, as a result, missed classes. As a result of time missed from class because of his health problems, Mr. Davis received a failing grade in the course.

Mr. Davis subsequently received a notice from George Mason that, because he had received two (2) failing grades, he was dismissed from the International Commerce and Policy masters program. In September of 2003, Mr. Davis

contacted George Mason regarding his grade in the Microeconomics course.

George Mason issued an Academic Catalog and the School of Public Policy Master's Programs Student Services Guide that provided procedures for appealing a grade in a course. The Academic Catalog also provides procedures for requesting and receiving a retroactive withdrawal from a course. J.A. at 33. For both a grade appeal and a request for a retroactive withdrawal, the student is to contact his academic dean.

In December of 2003, Mr. Davis met with Dr. Kingsley E. Haynes, Dean of the School of Public Policy for George Mason, to discuss a grade change for the Microeconomics course. At this meeting, Dr. Haynes informed Mr. Davis that, since the grade was earned in a course at George Washington, Mr. Davis would need to contact George Washington and request to retake the course or request a retroactive withdrawal. Following the meeting, Mr. Davis sent to Dr. Haynes documentation regarding his surgery to support his request for a grade change. Dr. Haynes sent Mr. Davis a reply by email and again informed Mr. Davis that any decision regarding a grade change must be made by George Washington.

Following Dr. Haynes's instructions, Mr. Davis contacted the Dean of Student Affairs for George Washington to request a retroactive withdrawal from the class. Mr. Davis provided the same materials and information to George Washington as he had provided to George Mason to substantiate his reasons for requesting a withdrawal. Upon review of the medical information provided by Mr. Davis, George

Washington agreed to change Mr. Davis' grade to a "W" and George Washington communicated its decision to George Mason.

On July 2, 2004, Mr. Davis received notice from George Mason that his request for a grade change was not timely and therefore would be denied. Mr. Davis contacted George Mason and explained to George Mason the reason for the delay.

George Mason, in its response to Mr. Davis, stated that only a George Mason academic dean may grant a retroactive withdrawal and that the program's academic dean, Dr. Haynes, would not grant a retroactive withdrawal. George Mason's response to Mr. Davis was contrary to its earlier representation that the only reason for not allowing George Washington's grade change was the lack of timeliness of the request. Additionally, George Mason's response is contrary to the representations made by Dr. Haynes that he would honor a retroactive withdrawal granted by George Washington.

REASONS FOR GRANTING THE PETITION

I. THE DECISION IN THE COURT BELOW THAT NO CONTRACT EXISTS BETWEEN MR. DAVIS AND GEORGE MASON UNIVERSITY CREATES A SPLIT BETWEEN CIRCUITS

The court of appeals' affirmance of the district court's ruling creates a conflict between the district court's ruling and the decisions in the First, Second, and Eighth Circuits about whether the relationship between a University and a student is contractual. The First, Second, and Eighth Circuits

have found that a contract exists between the university and the student. *See, e.g., Mangla v. Brown University*, 135 F.3d 80, 83 (1st Cir. 1998) ("The student-college relationship is essentially contractual in nature. . . . The terms of the contract may include statements provided in student manuals and registration materials." citations omitted); *Corso v. Creighton University*, 731 F.2d 529 (8th Cir. 1984) ("The relationship between a university and a student is contractual in nature."); *Branum v. Clark*, 927 F.2d 698 (2d Cir. 1991)

> "New York law's recognition of 'an implied contract between [a college or university] and its students,' requir[es] the 'academic institution [to] act in good faith in its dealing with its students.' [citation omitted] Such an implied contract, recognized under state law, provides the basis for a property interest that would be entitled to constitutional protection."

Clearly, a contract was formed between Mr. Davis and George Mason at the time of his matriculation into the International Commerce and Policy masters program. *See Mangla v. Brown University*, 135 F.3d 80, 83 (1st Cir. 1998) ("The student-college relationship is essentially contractual in nature. . . . The terms of the contract may include statements provided in student manuals and registration materials." citations omitted); *Corso v. Creighton University*, 731 F.2d 529 (8th Cir. 1984) ("The relationship between a university and a student is contractual in nature."); *Branum v. Clark*, 927 F.2d 698 (2d Cir. 1991); *Dinu v. President and Fellow of Harvard University*, 56 F. Supp.2d 129 (D. Mass. 1999); *Ross v. Pennsylvania State University*, 445 F. Supp. 147, 152 (M.D. Pa. 1978); *Gorman v. St. Raphael Academy*, 853 A.2d 28, 34 (R.I. 2004); *Johnson v. Lincoln Christian College*, 501 N.E.2d 1380, 1384 (Ill. App. 1986).

Affirming the decision that no contractual relationship existed between George Mason University and Mr. Davis stands in conflict with the above noted cases from the First, Second, and Eighth Circuits.

II. THE DECISION IN THE COURT BELOW THAT A PROPERTY INTEREST TO BE PROTECTED BY DUE PROCESS DOES NOT EXIST CREATES A SPLIT BETWEEN CIRCUITS

As to the issue of whether a property interest to be protected by the Fourteenth Amendment exists, a conflict has been created by affirming the district court's ruling with decisions in the Third and Sixth Circuits. *See Picozzi v. Sandalow*, 623 F. Supp. 1571, 1576 (E.D. Mich. 1986), *aff'd* 827 F.2d 770 (6th Cir. 1987) ("A public university student has a protected interest in continuing his studies."); *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984) ("a graduate student has a 'property' interest in continuing his studies."); *Evans v. West Virginia Board of Regents*, 271 S.E.2d 778, 781-82 (W. Va. 1980) ("we conclude that appellant has a sufficient property interest in the continuation and completion of his medical education to warrant the imposition of minimal procedural due process protections."). This Court has not yet determined whether a protectable property interest exists in a student's continued enrollment in a particular program. *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985) (assumed, without deciding, that a protected interest existed in the continued enrollment of a student for due process to apply); *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (same). Mr. Davis had a protected interest in his continued enrollment in the masters program and was assured that the grade change

necessary to remain in the program would be made if granted by George Washington, which was in fact granted by George Washington.

The Third and Sixth Circuits have found that such an interest exists while the district court ruled that one did not exist. To find that no property interest exists would create conflict between the decision of this Court and the decisions of other courts of appeals.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED AUGUST 3, 2006

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-2340

DARRYL G. DAVIS,

Plaintiff - Appellant,

versus

GEORGE MASON UNIVERSITY,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-05-504-1)

Submitted: June 30, 2006 Decided: August 3, 2006

Before NIEMEYER, TRAXLER, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Darryl G. Davis appeals the district court's order granting the defendant's motion to dismiss. We have reviewed the

record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Davis v. George Mason Univ.*, No. CA-05-504-1 (E.D. Va. filed Oct. 21, 2005 & entered Oct. 25, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

FILED: August 3, 2006

No. 05-2340
CA-05-504-1

DARRYL G. DAVIS,

Plaintiff - Appellant,

versus

GEORGE MASON UNIVERSITY,

Defendant - Appellee.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED AUGUST 21, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 1:05-504

DARRYL G. DAVIS,

Plaintiff,

v.

GEORGE MASON UNIVERSITY,

Defendant.

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendant George Mason University's Motion to Dismiss Plaintiff Darryl Davis's complaint under Federal Rule of Civil Procedure 12(b)(6). This case concerns Mr. Davis's academic dismissal from the International Commerce and Policy Master's Program at George Mason University. Mr. Davis was dismissed because he received two (2) failing grades in required courses which, under the policy of the graduate school, was grounds for dismissal from the program.

Appendix B

Although Plaintiff admits that he received two (2) failing grades, he alleges that George Mason University assured him that, if he obtained a retroactive withdrawal from one of the failed courses, he would not be dismissed from the program. The issues before the court are: (1) whether equitable estoppel will lie against George Mason University when it performs a governmental function (Count I); (2) whether the complaint states a claim for violation of procedural and substantive due process, where Plaintiff's claims turn on an alleged property interest in continued enrollment at George Mason University (Counts II and III); and (3) whether the course catalog, which plaintiff received, constitutes a contract such that plaintiff can state a claim for breach of contract against George Mason University (Count IV).

The Court dismisses Count I because equitable estoppel does not lie against George Mason University when it exercises a governmental function. The Court further holds that Counts II and III are dismissed because under Virginia law, there is no property interest in continued enrollment at a public university, and as such, Plaintiff's complaint fails to state a claim for violation of his Fifth Amendment procedural and substantive due process rights. Moreover, the Court holds that Count IV is dismissed because the course catalog is not a binding legal contract.

I. BACKGROUND

This case concerns the academic dismissal of Plaintiff Darryl Davis from the International Commerce and Policy Masters Program at George Mason University ("GMU"). Mr. Davis was dismissed because he received two (2) failing

grades in required courses which, under the policy of the graduate school, was grounds for dismissal from the program. (Comp]. ¶ 9, 12.) During the Fall Semester of 2002, Mr. Davis received his first "F" at GMU in a required course, ITRN 504 – Microeconomics and Trade for International Commerce. (*Id.* ¶ 9.) Mr. Davis retook the course at George Washington University ("GWU") through a consortium agreement between the two schools. (*Id.* ¶ 10.) Mr. Davis completed the course but failed it for a second time. (*Id.* ¶ 12.)

Mr. Davis received notice from GMU indicating that he was dismissed from the International Commerce Program because he had received two (2) failing grades. (Letter from Kingsley E. Haynes, Dean of the Sch. of Pub. Policy of GMU, to Darryl Davis (Sept. 8, 2003)). Mr. Davis met with Dr. Haynes, Dean of the School of Public Policy for GMU to discuss a grade change in the GWU Microeconomics course in December 2003. (Comp. ¶ 14.) Mr. Davis alleges that at this meeting Dr. Haynes told him that he could obtain a retroactive withdrawal from the course, thereby removing the failing grade and allowing him to stay in the program. (*Id.* ¶ 16.) Mr. Davis also alleges that Dr. Haynes told him that he would need to contact GWU to request the retroactive withdrawal. (*Id.*) Mr. Davis then obtained a retroactive withdrawal from the course from the Dean of Student Affairs at GWU and submitted it to GMU. *(Id.* ¶ 21.)

GMU notified Mr. Davis that his withdrawal request was denied because it was filed outside the time allotted under

the GMU University Catalog ("Catalog"). (Compl. ¶ 22.) The Catalog for the relevant academic year states in part that:

> A student may withdraw from a semester after the end of the drop period without academic penalty only for non-academic reasons that the student's academic dean approves as sufficient to merit an exception to policy.
>
> The last day for dropping a 14 week course is five calendar weeks after the first day of classes (including the first day).

(2002-2003 Geo. Mason Univ. Catalog, at 29.) When Mr. Davis contacted GMU to discuss the timeliness of his withdrawal request (*Id.* ¶ 23) GMU still refused to accept GWU's retroactive withdrawal. GMU stated that only academic deans from GMU can grant retroactive withdrawals to GMU students. (*Id.* ¶ 24.) GMU maintained that Mr. Davis was still dismissed because he had received two "F's." (*Id.* ¶ 24.) Mr. Davis filed this lawsuit seeking declaratory judgment (Count I), alleging violation of his Fifth Amendment procedural (Count II) and substantive (Count III) due process rights, and for breach of contract (Count IV). Defendant moves this Court to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

Appendix B

II. DISCUSSION

A. Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss should not be granted unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of the plaintiff's claim that would entitle the plaintiff to relief. FED. R. CIV. P. 12(b)(6); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs, Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir. 1993). Conclusory allegations regarding the legal effect of the facts alleged need not be accepted. *See Labram v. Havel,* 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiffs claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendants to prepare a fair response. *Conley,* 355 U.S. at 47.

B. Analysis

As a preliminary matter, the Court finds that Defendant's Motion to Dismiss was proper in that it does not include materials outside of the complaint. Although Plaintiff argues that Defendant's motion should be treated as a motion for summary judgment because it includes materials outside of the complaint, a letter from GMU to Darryl Davis dated September 8, 2003 (Pl.'s Opp. to Mot. to Dismiss at 2) all of

the materials referred to by Defendant were properly argued in the Motion to Dismiss. In the Eastern District of Virginia,

> when a plaintiff fails to introduce a pertinent document as part of his complaint, the defendant may attach the document to a motion to dismiss the complaint and the Court may consider the same without converting the motion to one for summary judgment. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil*, § 1327, at 762-63 (2d ed. 1990). This ruling encompasses not only documents quoted, relied upon, or incorporated by reference in the complaint, but also official public records pertinent to the plaintiffs' claims.

Gasner v. County Dinwiddie, 162 F.R.D. 280, 282 (E.D. Va. 1995). Any documents referenced in the complaint can properly be attached to Defendant's Motion to Dismiss. Here, the September 8, 2005, letter from GMU that the Defendant attached to its Motion to Dismiss was referenced to in the complaint. (Compl. ¶ 13.) Therefore, Defendant's Motion to Dismiss is proper in that it does not include materials outside of the complaint. Thus, the Court will view this motion as a motion to dismiss and not treat it as a motion for summary judgment.

Count I

The Court holds that Count I is dismissed because equitable estoppel does not lie against GMU when it exercises a governmental function. Under Virginia law, "estoppel does

not apply to the government in the discharge of its governmental functions." *Gwinn v. Alward,* 232 Va. 616, 621 (1988). Here, GMU is a public state university and the complaint indicates that at all relevant times GMU was acting in its normal governmental function. Therefore, Plaintiff is precluded from claiming equitable estoppel.

Even assuming that estoppel could apply to GMU, Count I is dismissed because Mr. Davis has not sufficiently pled how he has changed his position or has been prejudiced by relying on Dr. Haynes's representations. A plaintiff must plead representation, reliance, a change of position, and detriment in order to establish an action for equitable estoppel, absent a showing of fraud and deception. *Dominick v. Vassar,* 235 Va. 295, 299 (1988). Here, Mr. Davis fails to plead that he took any steps to his detriment in reliance on the actions of GMU. Furthermore, Mr. Davis fails to plead how he has been prejudiced as a result of GMU's actions. The mere fact that he submitted a request for a retroactive withdrawal from a failed course to GMU did not constitute a change in Mr. Davis's position, rather this action was only an act in furtherance of his current position. Therefore, Count I is dismissed because Mr. Davis has not sufficiently pled how he has changed his position or has been prejudiced by relying on Dr. Haynes's representations. Additionally, Count I is dismissed because equitable estoppel will not lie against GMU when it exercises a governmental function.

Counts II and III

The Court holds that Counts II and III are dismissed because the Court finds that Mr. Davis has no property

interest in continued enrollment in GMU to support a claim for violation of Fifth Amendment procedural or substantive due process.

The Supreme Court has stated that property must be "a legitimate claim of entitlement." *Bd. of Regents State Colls. v. Roth,* 408 U.S. 564, 569 (1972). The Supreme Court has further articulated that a claim of entitlement is not created by federal law, instead it "is created and .. defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

Although Plaintiff cites cases where other jurisdictions have recognized a property interest in continued enrollment, those cases either involved an underlying state created interest, *see Branum v. Clark,* 927 F.2d 698 (2d Cir. 1991) (analyzing a New York state law recognizing an implied contract between a college or university and its students); *Harris v. Blake,* 798 F.2d 419, 422-23 (10th Cir. 1986) (explaining that the Colorado Legislature has created a protected property interest in public education); *Donohue v. Baker,* 976 F. Supp. 136 (N.D.N.Y. 1997), or assumed a protected interest without deciding there was one. *Regents of the Univ. of Mich. v. Ewing,* 474 U.S. 214, 222 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 91-92 (1978).

Mr. Davis failed to allege in his complaint, or argue in his Opposition to the Motion to Dismiss, that a state created property interest in continued enrollment at a public

education institution exists in Virginia. Moreover, when pressed at oral arguments, neither party could cite any Virginia statute or case law that created such a property interest. Without this underlying state created property interest, Plaintiff does not state a claim for violations of procedural or substantive due process.

Even assuming that Mr. Davis does have a state property interest in continued enrollment at GMU, both the procedural and substantive due process violation claims still fail.

Procedural Due Process

Even assuming that Mr. Davis does have a state property interest in continued enrollment at GMU, the Court finds that the procedural due process violation claim fails because Mr. Davis signed a School of Public Policy Student Services Guide Receipt certifying that he received the Master Student Service Guide. The Guide states in part that "[w]ithdrawal after the last day for dropping a course (specified in the Academic Calendar) requires approval by the student's academic dean and is permitted only for nonacademic reasons that prevent course completion." (GMU *Sch. of Pub. Pol'y Master's Programs Student Serv. Guide 2002-2003,* at 19). Here, Dr. Haynes considered Mr. Davis's request and denied it. Thus, because Mr. Davis received notice of the procedure and the procedure was followed, Mr. Davis's procedural due process violation claim fails.

Appendix B

Substantive Due Process

Even assuming that Mr. Davis had a state created property interest in continued enrollment at GMU, the court finds that the substantive due process violation claim fails because Mr. Davis has failed to allege that GMU's actions were arbitrary and capricious. In the area of academics, substantive due process protection shields individuals only from actions that are arbitrary and capricious. *Bd. of Curators of Univ. of Mo.*, 435 U.S. at 91-92.

Here, GMU made a formal decision pursuant to its own policies and guidelines and notified Mr. Davis of its decision and reasons for it. (Compl. ¶ 24.) Mr. Davis failed to plead how GMU's denial of his request was arbitrary and capricious or how it was a substantial departure from academic norms. Therefore, Plaintiff's substantive due process violation claim fails because Mr. Davis has failed to allege that GMU's actions were arbitrary and capricious.

Count IV

The Court holds that Count IV alleging breach of contract is dismissed because the Catalog is not a contract, and thus any breach of it is not actionable.

In Virginia, in order for there to be a contract there must be an absolute mutuality of engagement so that each party is bound and has the right to hold the other party to the agreement. *JGB Indus. Inc. v. Simon-Telelect, Inc.*, 221 B.R. 176, 183 (E.D. Va. 1998). Here, the Catalog amounts to an unenforceable illusory contract because it purports to promise

specified performance, but the performance by GMU, the promissor, is entirely optional. *Id.* The catalog states that

> [t]he catalog is the normal repository of policy statements; but corrections, changes, or interpretations can be promulgated by other means, including electronic publication. When the university or one of its academic units makes changes in course requirements, grading procedures, and/or the level of qualitative performance expected of its students for acceptance into particular programs, academic standing, or graduation, the changes apply to all students enrolled in the university at the time of implementation of the change and thereafter.

(GMU University Catalog 2002-2003, at 25). Thus, with such ephemeral terms and lack of absolute mutuality as required in Virginia, the Court finds that the Catalog is not a contract.

Additionally, the GMU School of Public Policy Master's Programs Student Services Guide 2002-2003 explicitly provides that "[t]he provisions of this Guide are subordinate to the University's general catalog and rules and do not constitute a contract with the students to whom they apply." (GMU *Sch. of Pub. Pol.'y Master's Programs Student Serv. Guide 2002-2003,* at 5.) Because Mr. Davis had no contract with GMU, there can be no breach of contract claim and Defendant's Motion to Dismiss the contract claim is granted.

Appendix B

II. CONCLUSION

For the reasons discussed above, this Court grants Defendant George Mason University's Motion to Dismiss. The Court holds that Count I is dismissed because equitable estoppel does not lie against George Mason University when it exercises a governmental function. Counts II and III are dismissed because, under Virginia law, there is no property interest in continued enrollment at a public university in Virginia, and as such, Plaintiff's complaint fails to state a claim for violation of his Fifth Amendment procedural or substantive due process rights. Count IV is dismissed, because the Catalog is not a binding legal contract.

It is hereby

ORDERED that Defendant George Mason University's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 21st day of October, 2005.

s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
10/21/105

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 13, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2340
CA-05-504-1

DARRYL G. DAVIS

Plaintiff - Appellant

v.

GEORGE MASON UNIVERSITY

Defendant - Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Traxler, and Judge Duncan.

For the Court,
/s/ Patricia S. Connor
CLERK